The Harriman Institute Forum

Volume 5, Number 3
November 1991

Peter B. Maggs,
"Post -Soviet Law: The Case of Intellectual Property Law "

THE HARRIMAN INSTITUTE
FORUM

Volume 5, Number 3 *November 1991*

POST-SOVIET LAW: THE CASE OF INTELLECTUAL PROPERTY LAW

by Peter B. Maggs

What system of law will emerge from the dissolution of the strongly-centralized Soviet system? This paper uses traditional legal analysis to predict the structure of post-Soviet intellectual property law. The analysis provides answers that are detailed and concrete. The answers are also reassuring in that they suggest that a healthy system of intellectual property law can emerge reincarnated from the remains of the Soviet system. Similar analysis applied to other areas of the law could provide further insights into the future of the post-Soviet legal system.

"Intellectual property law" is a shorthand term for the combination of trade secret, patent, design protection, copyright, and trademark law. Intellectual property law provides a variety of incentives necessary for the health of a market economy. In contrast, it has a minimal role in a Soviet-type command-administrative system. Nevertheless, it has existed throughout the period of Soviet rule, though it has been "deep-frozen and kept in store for possible later revitalization."[1] As a background to the possible reanimation of intellectual property law, one should consider its previous incarnations in Imperial Russia and the Soviet Union.

Intellectual Property Law in Imperial Russia

Imperial Russia had a system of intellectual property protection for its own subjects comparable in most respects to that of other industrialized countries.[2] Patent law treated foreigners on an equal basis with Russian subjects. Patents, however, were not available either for chemical substances or medicinal preparations. Trademark registration was also available to foreigners on an equal basis. Copyright law, in contrast, discriminated strongly against foreigners. Before the 1911 Act, copyright protection applied only to works first published in Russia. Even after the 1911 Act, anyone was free to make and publish a translation of a work first published abroad. Russia never joined the leading international copyright treaty, the Berne Convention. On the eve of World War I, it grudgingly signed short-term bilateral copyright agreements with France, Germany, Belgium, and Denmark. These nations had made the provision of improved copyright protection a condition of their agreement to commercial treaties. The United States was to make the same requirement in its 1990 trade treaty negotiations.

1 Manfred Wilhelm Balz, *Invention and Innovation under Soviet Law* (Lexington: D.C. Heath, 1975), p. 35.
2 For a general discussion and citations of the relevant legislation on patents and trademarks, see A. M. Guliaev, *Russkoye grazhdanskoye pravo* (Sankt-Petersburg: Tipografiya M. Stasiulevicha, 1911), pp. 231-235. On copyright law see Michael Newcity, *Copyright Law in the Soviet Union* (New York: Praeger, 1978) and the Law of March 20, 1911, "Ob avtorskom prave," *Sobr. uzak.*, 1911, Part 1, No. 61, item 560.

Intellectual Property Law 1917-1921

Legislation in 1917-1919 provided for the transition from private to state ownership of intellectual property. A 1917 decree gave the People's Commission on Education the right to a five-year monopoly on publication of classics of Russian literature whose copyright had expired.[3] A 1918 decree gave the People's Commissariat of Education the right to declare individual scientific, literary, musical, and artistic works public property, but required it to pay royalties.[4] It provided that other works would be published in accordance with contracts with the authors. It strictly limited rights of heirs of dead authors to royalties. It continued the pre-revolutionary practice of allowing translations of foreign works without respect for the rights of foreign authors. The principles of unilateral setting of publication terms by the state, of limiting compensation for heirs, and of freedom of translation were to remain in effect for decades. Legislation in 1919 annulled the rights of private publishers.[5] Patent law followed a pattern like that of copyright law. A 1919 decree nationalized inventions, but provided for payment to inventors.[6]

Intellectual Property Law Under the New Economic Policy

With the adoption of the New Economic Policy in 1922, there was a restoration of property rights, including intellectual property rights.[7] After the formation of the Soviet Union, intellectual property was governed primarily by All-Union legislation. In 1924, the USSR enacted a traditional, market-oriented patent law,[8] and in 1925 it adopted Fundamental Principles of Copyright Law along traditional lines.[9] The republics then enacted their own copyright laws, copying the USSR Fundamental Principles almost verbatim.[10]

Intellectual Property Law Under Stalin

With the end of NEP, the USSR adopted new intellectual property legislation. In 1928 it enacted new Fundamental Principles of Copyright Law and the republics enacted conforming legislation.[11] Private publishers disappeared, and publication became a state monopoly for sixty years. In 1931, patent legislation moved to a socialist model, which remained in place until 1991. As with copyright, the basic legislation was enacted at the USSR level. But unlike copyright, there was no detailed legislation at the republic level. From the 1930s through the 1980s, the majority of inventive efforts in the Soviet Union have been the result of work by state organizations under centrally determined research plans. The law on protection of inventions has served only subsidiary purposes. It has provided small bonus payments for the actual employee-inventors. It has acted as a formal channel for distribution of information about inventions. The primary form of invention protection was the "inventor's certificate" system. The procedure for obtaining an inventor's certificate was similar to that for obtaining a patent in most other countries. The inventor or his employer submitted an application to a USSR-level administrative agency for examination. The Committee's clerical staff checked to see that the application met formal requirements. If it did, the Committee's technical experts then compared the claimed invention with a collection of world patent and technical literature. If the idea was really new, the Committee issued an inventor's certificate. If the Committee rejected the application, the inventor had no right to contest the rejection in court. The issuance of an inventor's certificate provided cash rewards, recognition, and fringe benefits for the inventor. The inventor's certificate system also provided a means of gathering and distributing information about new inventions. The government organized the distribution of abstracts and copies

3 "O gosudarstvennom izdatel'stve," *Sobr. uzak. RSFSR*, 1918, Part 1, No. 14, item 201.
4 "O priznanii nauchnykh, literaturnykh, muzykal'nykh i khudozhestvennykh proizvedenii gosudarstvennym dostoyaniem," *Sobr. uzak. RSFSR*, 1918, Part 1, No. 86, item 900.
5 "O prekrashchenyy sily dogovorov na priobretaniye v polnuyu sobstvennost' proizvedenii literatury i isskustva," *Sobr. uzak. RSFSR*, 1919, No. 51, item 492.
6 "Ob izobreteniyakh (Polozheniye)," *Sobr. uzak. RSFSR*, 1919, No. 34, item. 341.
7 "Ob osnovnykh imushchestvennykh pravakh, priznavayemykh RSFSR, okhranyayemykh ee zakonami i zashchishchayemykh sudami RSFSR, *Sobr. uzak. RSFSR*, 1922, No. 36, item 423.
8 "O patentakh na izobreteniya," *SZ SSSR*, 1924, No. 9, item 97.
9 "Ob osnovakh avtorskogo prava," *SZ SSSR*, 1925, No. 7, item 67.
10 E.g., *Sobr. uzak. RSFSR*, 1926, item 72, No. 567.
11 "Osnovy avtorskogo prava," *SZ SSSR*, 1928, No. 27, item 246.

of inventors' certificates to libraries throughout the Soviet Union. Unlike a patent, an inventor's certificate did not grant a monopoly on the invention. Soviet law did provide for patents giving monopoly rights. However, Soviet enterprises were not ordinarily eligible for patents. Soviet citizens were rarely in a position to exploit patents. Few foreign companies thought Soviet patents were worth the rather high fees. Why, then, has the USSR retained a patent system in parallel with its system of planned innovation and inventors' certificates? The main reason probably has been the need to maintain an appearance of respectability before its foreign trading partners. Perhaps some drafters of patent legislation also secretly hoped for the return of a real patent system and wished to keep the institution of patents alive.

In its economic essence the Soviet system has differed substantially from the patent system in countries such as the United States. In the Soviet Union, central planners have made investment decisions. In the United States, prospective profits from a copyright or patent monopoly serve as a guide to companies in investing research and development funds. Profits from licensing encourage the marketing of patentable ideas. The availability of intellectual property protection has not been a factor in Soviet investment decision making. Furthermore, the enterprise which made an invention has had little incentive to persuade other enterprises to use the invention.

Stalin's 1936 Constitution envisioned a further restriction on legislative autonomy of the union republics. It called for the enactment of a Civil Code of the USSR. The enactment of such a code would have required the repeal of the Russian republic and other republic civil codes. It would have left the republics no room to legislate at all on intellectual property. Such a code, however, was never enacted.

Intellectual Property Law from the 1960s Through the 1980s

In 1957, the USSR Supreme Soviet amended the USSR Constitution to eliminate Stalin's dream of a USSR Civil Code and return the situation to what it had been in fact all along, namely, that the USSR enacted "Fundamental Principles" while the Union Republics enacted codes.[12] In 1961, the USSR adopted Fundamental Principles of Civil Legislation which provided basic rules on all areas of civil law, including copyright and patent law. The union republics then enacted new civil codes, repeating the provisions of the Fundamental Principles and adding details on points not covered by the Fundamental Principles. The new civil codes, unlike the codes of the 1920s, contained detailed provisions on copyright law and some provisions on patent law. Most patent, copyright, and trademark law, however, remained at the all-Union level, in the form of legislative acts issued by various levels of the all-Union government. The system was essentially static for the next thirty years. Both publishing and innovation were managed by state planning, not by market forces, so that copyright and patent were of no real significance. The absence of competition made trademarks equally unimportant. Nevertheless, the republics by the mid-1970s had complete and modern copyright legislation, superior in the protection it offered to that of Imperial Russia. The Union had trademark and patent legislation equal in scope of protection to that of Imperial Russia. With this legislation on the books, the USSR was in a position to become a party to major international treaties for the protection of intellectual property.

The Development of Soviet International Relations in Intellectual Property Law

In the late 1960s and early 1970s, the USSR joined the world intellectual property community. In 1965, it acceded to the leading international convention on patents, trademarks, and unfair competition, the Paris Convention for the Protection of Intellectual Property.[13] In 1973, it acceded to the Universal Copyright Convention.[14] At the time of accession to the Paris Convention, Soviet patent and trademark law already conformed in general to world standards, so few changes were needed in Soviet legisla-

12 "Ob otnesenii k vedeniyu soyuznykh respublik zakonodatel'stva ob ustroystve sudov soyuznykh respublik, prinyatiya grazhdanskogo, ugolovnogo i protsessual'nykh kodeksov," *Vedomosti SSSR*, 1957, No. 4, item 63.

13 Peter B. Maggs and James W. Jerz, "The Significance of Soviet Accession to the Paris Convention for the Protection of Industrial Property," *Journal of the Patent Office Society*, Vol. 48 (April 1966), pp. 242-263.

14 Jon A. Baumgarten, *US-USSR Copyright Relations Under the Universal Copyright Convention* (New York: Practising Law Institute, 1973); Peter B. Maggs, "New Directions in U.S.-U.S.S.R. Copyright Relations," *American Journal of International Law*, Vol. 68 (July1974), pp. 391-409.

tion. However, joining the Universal Copyright Convention required a number of changes. In particular it required giving up the rule inherited from Imperial Russia allowing free publication of translations of foreign works. The Soviet Union also became a party to the Patent Cooperation Treaty, which provides worldwide unification of technical rules governing patent applications and encourages the sharing of patent examination results among patent offices in different countries. By the late 1980s, Soviet copyright experts were saying in private conversations that the Soviet Union would soon strengthen copyright protection further and would join the stronger of the two international copyright conventions, the Berne Convention.

Soviet Intellectual Property Law on the Eve of the August 1991 Coup

A. Copyright

During the 1980s, the United States substantially increased the level of intellectual property protection under its own laws and began putting heavy (sometimes heavy-handed) pressure on its trading partners to do likewise. It demanded that they join the Berne Convention (which provided a considerably higher level of protection than the Universal Copyright Convention), that they provide copyright protection for computer software, that they provide protection for computer chip designs, and that they stamp out video-piracy and trademark violations. When the United States negotiated a new trade treaty with the USSR in 1990, improvement of intellectual property protection became a prime demand of the U. S. negotiators. In June 1991, the USSR Supreme Soviet adopted new Fundamental Principles of Civil Legislation containing major changes to copyright law.[15] By this time there was a "war of laws" going on in many areas between the Union and the republics. Thus, even if the events of August 1991 had not happened, the Union would have had difficulty in getting the republics to revise their civil codes to conform to the Fundamental Principles.

The 1991 USSR Fundamental Principles raised the level of copyright protection so as to allow the USSR to join the leading copyright treaty—the Berne Convention. As promised in trade treaty negotiations with the United States,[16] the Fundamental Principles expanded the categories of protected works to include computer software.[17] Soviet drafters had sought, by these changes, to satisfy the copyright provisions of the unratified US-USSR Trade Treaty. However, the United States government, pressured by the motion picture industry, found the copyright provisions inadequate in failing to provide clear protection against the widespread practices of unauthorized copying and public performance of videotapes. The USSR government met the United States' objections by agreeing to move rapidly to enact new legislation clearly providing civil remedies for unauthorized performance of videotapes and providing criminal penalties for various forms of copyright infringement.

The Fundamental Principles continue the Soviet tradition of restricting freedom of contract. They provide that legislation may set various terms of author-publisher contracts. The Fundamental Principles predetermine the relationships between employed authors and their employers rather than leaving them to be decided by the parties. By the summer of 1991, however, it was by no means clear that the republics would accept these anti-market provisions.

B. Patents

A new USSR Law on Inventions took effect on July 1, 1991.[18] This law was part of an overall modernization of Soviet intellectual property law. Like the copyright law changes, the new Law on Inventions had the dual purpose of preparing for the transition to a market economy and improving relations with foreign trading partners. The new law was based upon the assumption that the USSR would continue to have a unified system for the protection of inventions. The law even called for strengthening centralization by creating a USSR Patent Court with ultimate jurisdiction over patent disputes. The Law on Inventions provided that this Patent Court was to be established by a separate law, "On the USSR Patent Court." During the de-

15 "Osnovy grazhdanskogo zakonodatel'stva Soyuza SSR i respublik," *Izvestiya*, 25 June 1991, p. 3.
16 *BNA Patent, Trademark & Copyright Journal*, Vol. 40 (1990), pp. 144-145.
17 The software protection, however, only applies to programs written after December 31, 1991.
18 "Ob izobreteniyakh v SSSR," *Izvestiya*, 14 June 1991, p. 4.

bates on the law this attempt at further centralization met opposition. The parliamentary leadership promised that this Court would be not created until the USSR Constitution was amended to provide for it.[19] The Patent Court was not on the list of institutions in the Economic Community Treaty signed on October 18, 1991.[20] The new law abolished the inventor's certificate system, providing only for patents. Prior drafts of the law would have continued the inventor's certificate system disguised under the new name of the "State Patent Fund."[21] The law as enacted provided a different and more limited role for this Fund, as the administrator of state-owned patents. However, the law envisioned that the State Patent Fund, like private owners, would sell patent licenses on a market basis.

The new law greatly strengthens the procedural rights of inventors. Patent procedures under the law are comparable to those in the United States and West European market-oriented countries. An applicant whose application is rejected is given the right of appeal to the Appeals Council of the Patent Office. From there the applicant could appeal to the USSR Patent Court. If the Patent Office failed to reject an application within 18 months, the law provided for publication of the application and the grant of interim protection. During a six-month period anyone could contest patentability before the Appeals Council of the patent office. The patent-holder could bring a court action for injunction and damages for infringement.

Politics appears to have prevailed over market-oriented economics in the provisions of the Law on Inventions, limiting the freedom of employers and employees to contract with respect to rights in inventions. The law started from the principle that employed inventors owned all rights to inventions made during their employment. There were a number of restrictions on contracts by employees to give rights in future inventions to employers. Such contracts might only deal with inventions made in fulfillment of concrete, employer-assigned tasks. Even for such inventions, the employer had to provide legally-specified compensation and fringe benefits to employees. The contract could not prevent the employee from using the invention in the employee's competing business. If the employer failed to apply for a patent, the employee was given the right to do so, thus destroying trade secrets related to the invention. However, foreign investors could preclude these employee rights by using appropriate language in enterprise charters.

The law provided a very liberal five-year tax holiday from USSR taxes for patent-related income. This was a silly provision because it presents hopeless problems of allocation. Suppose an enterprise patents a better mousetrap and sells the trap for 100 rubles. How much of the 100 rubles qualifies under the statute as "from the use of the invention"? Republic tax legislation has not provided a similar exemption.

The law granted "enterprises . . . with foreign investment" exemption from certain provisions on employee rights and patenting abroad. Such enterprises were free to contract with employees on invention rights, but only if they have appropriate language in their charters. They were also exempt from some of the restrictions on applying for foreign patents. The USSR and Russian Republic foreign investment laws reconfirm these privileges, so the fate of the USSR should not affect the position of foreign investors who found new enterprises. Foreign investors who buy into existing enterprises would have to secure a change in the enterprises' charters to take advantage of these provisions.

The law met a number of demands of foreign trading partners of the USSR. It ended the monopoly of the All-Union Chamber of Commerce and Industry on the preparation of patent applications for foreign companies. The result should be access to better and cheaper patent agents. As demanded by U. S. trade treaty negotiators, it made patents available for pharmaceuticals and microorganisms and extended the patent term to 20 years from the date of application.

C. Industrial Models

On July 10, 1991, the USSR adopted a law on "Industrial Models."[22] This law provided for the grant of patent-like protection for ten years to the external appearance of products—to their shape, not their functions. In other words, an inventor who produced a more efficient mousetrap would get a regular patent, while one who produced a more beautiful mousetrap would get an industrial model patent. Most other countries offer similar protec-

19 *Izvestiya*, 1 June 1991, p. 1.
20 "Economic Community Treaty - Full Text," Tass dispatch, Moscow, 21 October 1991.
21 Peter B. Maggs, "The Restructuring of the Soviet Law of Inventions," *Columbia Journal of Transnational Law*, Vol. 28 (1990), pp. 277-289.
22 "O promyshlennykh obraztsakh," *Izvestiya*, 10 August 1991, p. 3.

tion—the United States, for instance, offers "design patents." Under the Law the USSR Patent Office was to examine application against existing designs to determine if they met the standard of world-wide novelty.

D. Trademarks

On July 3, 1991, the USSR adopted a new trademark law, replacing a previous Council of Ministers decree.[23] The new law did not make significant changes in the level of trademark protection, which had long met the international standards required by the Paris Convention for the protection of industrial property.

E. Trade Secrets

The 1990 USSR Law on Enterprises[24] broke with Soviet tradition by providing for the protection of trade secrets. Previous Soviet legislation had required state enterprises to share technical information freely with one another. This approach was quite appropriate for a planned economy, but would be unworkable in a market economy. In late December 1990 the Russian Republic adopted its own Enterprise Law,[25] and purported to repeal the USSR Enterprise Law.[26] However, at the same time the Russian republic adopted a property law that provided for the protection of "intellectual property" defined as follows:[27]

> The objects of intellectual property are productions of science, literature, art, and of other types of creative activity in the sphere of production, including discoveries, inventions, improvement proposals, industrial models, computer programs, data bases, expert systems, know-how, trade secrets, trade marks, firm names, and service marks.

This paragraph clearly tracked the similar language of the unratified U.S.-Soviet trade treaty and was an important step in the improvement of U.S.-Russian trade relations.

The USSR Law on Inventions would allow employees to practice their inventions in competition with the employer and to patent their inventions if employers refused to patent them. Only in enterprises with foreign investment could employees contract to waive these rights. The result, for domestic enterprises, is incompatible with trade secret protection.

Post-Soviet Intellectual Property Treaty Obligations

A. Members of a Successor State

What will be the status of intellectual property treaties in a new economic community of former Soviet republics? This depends upon whether the new community has the status of a successor state under international law, or if it is merely a non-state organization of some of the former members of the USSR. If it is a successor state, it will succeed to the treaty obligations of its predecessor.[28] The Soviet Union as of September 1, 1991 was a party to almost all (the major exception being the Berne Copyright Convention) the leading international treaties on intellectual property:[29] the Universal Copyright Convention, the Paris Convention for the Protection of Industrial Property, the Nice Agreement as Revised Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, the Patent Cooperation Treaty, the Strasbourg Agreement Concerning the International Patent Classification, the Budapest Treaty on the International Recognition of Deposit of Microorganisms, and the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite. Under these treaties, a successor state would be obliged to maintain a full-fledged system of patent, copyright, trademark, and unfair competition law.

B. Former Members of the Soviet Union if it Dissolves Without the Creation of a Successor State

If the Soviet Union dissolves without the creation of a separate state, then the sovereign states that emerge will be bound to the intellectual property treaties to which the USSR is a party. Article 34 of

23 "O tovarnykh znakov i znakov obsluzhivaniya," *Izvestiya*, 20 July 1991, p. 2.
24 "O predpriyatiyakh v SSSR," *Vedomosti SSSR*, 1990, No. 25, item 460.
25 "O predpriyatiyakh i predprinimatel'skoi deyatel'nosti," *Sovetskaya Rossiya*, 12 January 1991, p. 1.
26 "O poryadke vvedeniya v deystviye Zakona RSFSR 'O predpriyatiyakh i predprinimatel'skoy deyatel'nosti,'" *Sovetskaya Rossiya*, 12 January 1991, p. 5.
27 "O sobstvennosti v RSFSR," *Sovetskaya Rossiya*, 10 January 1991, p. 1, Art. 4.
28 Vienna Convention on Succession of States in Respect of Treaties, *International Legal Materials*, Vol. 17 (1978) p. 1488, Art. 35.
29 Citations and lists of parties for these treaties are given in United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1990 (Washington: U.S. Government Printing Office, 1990).*

the Vienna Convention on Succession of States in Respect to Treaties provides:[30]

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed.

(b) . . .

In the case of a bilateral treaty, for instance a U.S.-Soviet trade treaty, each successor state would be bound, thus creating U.S-Russia, U.S.-Kazakhstan, etc., trade treaty relations. In the case of a multilateral treaty, such as the Paris Convention for the Protection of Industrial Property, each successor state would be a party to the treaty. This clearly would mean that Russia, Kazakhstan, etc., would be bound to provide patent and trademark protection to nationals of the United States, France, Germany, etc. A somewhat less certain conclusion is that Russia and Kazakhstan, upon dissolution of the union, would become bound to one another by the treaty.

In a very few instances, republics have acceded directly to industrial property treaties. The Ukrainian and Byelorussian republics have been members of the United Nations. As such they became direct parties to the Convention Establishing the World Intellectual Property Organization, and have been recognized as such by the U.S. State Department.[31] If they become independent states they will remain parties to this Convention.

C. States Leaving the Soviet Union Before its Dissolution

There are at least three cases to consider: (1) a Baltic state, which does not recognize the legitimacy of the imposition of Soviet law on its territory; (2) a state seceding from the Soviet Union and becoming independent— Georgia is a possible example; (3) a state seceding from the Soviet Union and becoming part of another country—Moldova is a possible example.

The Baltic States — Estonia, Latvia, and Lithuania — do not succeed to the international treaty obligations of the Soviet Union. Their own view, and that of the United States, is that the Soviet takeover was an illegal act which did not affect their status as parties to international treaties. Even if one regards them as having been incorporated into the Soviet Union, they should now be regarded as "newly independent states," and as such are not bound by treaty obligations undertaken by the USSR. However, in their own view, and that of the United States, though perhaps not that of some countries, they still enjoy the benefits (and burdens) of treaties to which they became parties before the Soviet takeover. In the area of intellectual property law, Latvia and Estonia previously were parties to the Paris Convention for the Protection of Industrial Property.[32] All three Baltic states concluded numerous bilateral treaties on trade and intellectual property in the 1920s and 1930s.

If Georgia secedes from the Soviet Union, but the Union or a successor state continues, Georgia will continue to be bound by the intellectual property treaties to which the USSR was a party at the moment of secession.[33] Arguably it and the Soviet Union and other newly independent republics will also become mutually bound by these treaties.

If Moldova becomes part of Romania, it will become bound by those treaties to which Romania is a party.[34] Romania is a party to the Berne Copyright Convention and the Paris Convention for the Protection of Industrial Property. Moldova would have no need to establish a patent or trademark office, since the present Romanian authorities would handle those functions.

Intellectual Property Law in Former Soviet Republics

A. Copyright Law

The situation of a former Soviet republic in copyright law will present relatively few problems. Each republic now has a civil code with extensive copyright and contract law provisions. Each republic has civil courts with jurisdiction over disputes arising under the civil code. Many republics are converting their old system of economic tribunals

30 Vienna Convention on Succession of States in Respect of Treaties, *op. cit.*, p. 1488.
31 A list of the parties for this treaty can be found in Treaties in Force, *op. cit.*
32 2 June 1911, 38 Stat. 1645, T.S. 579, Treaties in Force, *op. cit.*
33 Vienna Convention on Succession of States in Respect of Treaties, *op. cit.*, p. 1488, Art. 35.
34 *Ibid.*, Art. 15.

into commercial courts.[35] These courts will continue to resolve disputes between authors and publishers and disputes between copyright owners and alleged plagiarists and pirates. All republic codes contain amendments introduced after the 1973 Soviet ratification of the Universal Copyright Convention to provide the level of copyright protection required by that Convention. None of the codes, however, provides the higher level of protection required by the Berne Convention or demanded by U. S. trade treaty negotiators. The republics could reach Berne-level protection immediately by adopting legislation providing that the 1991 USSR Fundamental Principles of Civil Legislation (which do provide Berne-level protection) should prevail over contradictory provisions of the republic civil codes, pending revision of the civil codes. If the republics wish respectability in the international trade community, they will amend their civil codes to provide Berne-level copyright protection and will, if they become independent states, adhere to the Berne Convention. The republics will be under pressure to adopt legislation meeting U. S. demands for protection of computer software, computer chip designs, and videotapes.

The situation in patent and trademark law is more complex, because patent and trademark law require not only legislation but also institutional structure. Detailed patent and trademark legislation and government agencies for the registration of patents and trademarks now exist only at the USSR level. It would not be difficult to put the USSR patent legislation into a word processor, substitute the name of the republic for "USSR" throughout, and adopt the resulting document at the republic level. Creating the necessary institutional structure presents much more serious problems, particularly in the case of patents. Patent laws provide for the issuance of patents only if the patent office has found that the applicant has invented something previously unknown anywhere in the world. In order to examine a patent application for worldwide novelty, a patent office must have a staff of patent examiners familiar with the latest developments in all areas of technology and a world-class library of patents and technical publications. Keeping a unified patent makes a great deal of practical sense. In *The Federalist*, James Madison justified the clause in the United States Constitution giving Congress power over patents and copyrights. He argued that, "States cannot separately make effectual provision for either of these cases . . ." It would be very difficult to create a dozen republic level patent offices, each capable of examining patent applications to see if they advance the world level of technology. At present, the USSR Patent Office has the expertise and library facilities to conduct such examination, but no republic institutions are capable of conducting patent examinations. The treaty on an "Economic Community" signed on October 18 envisions a continued central role for this patent office.[36] Article 54 calls for the negotiation of a separate multilateral agreement on a patent service. Article 5 of the draft treaty suggests harmonization (*sblizheniye*) of policy on patents. There are at least three possible forms a new patent service could take. Like the European Economic Community Patent Office, a new post-Soviet Economic Community Patent Office could issue patents valid community-wide. The Economic Community Patent Office could become a service center, not issuing any patents, but performing examination of patent applications under contract for the republics. A third possibility is that the Russian republic would take over the USSR Patent Office. The Patent Cooperation Treaty would then provide a formal legal basis for use by the other republics of results of patent examination by the Russian republic.

Trademark screening is much simpler, merely requiring checking of existing marks on a trademark register to make sure a newly proposed mark is not identical or close to an existing name. Each republic could start its trademark register by making a physical copy of the existing USSR trademark register. They could then pass legislation providing that marks previously registered by USSR authorities would be protected along with marks newly registered at the republic level. If there were a delay in establishing a registration system, foreign companies would have the protection provided by the Paris Convention for the Protection of Industrial Property, which requires the protection of "well-known marks" even though they are not registered.[37]

35 These economic tribunals have had the misleading name of "state arbitration." In fact, however, they have not engaged in arbitration, but have acted as courts.
36 See footnote 20 above.
37 Article 6[bis].

Intellectual Property Law in the Baltic States

A. Copyright Law

The Baltic states are still enforcing civil codes from the Soviet occupation period. (The enforcement of law of another state is hardly unusual. During the 1920s and 1930s, the Baltic states continued to enforce Imperial Russian civil legislation. Courts in the United States are still enforcing English law dating from before the American revolution, except in Louisiana, where the Napoleonic Code is still in force.) As mentioned above, these Soviet-era codes contain copyright law provisions conforming to the Universal Copyright Convention, but not reaching the high level of protection demanded by the Berne Convention, or the even higher level demanded by U. S. trade negotiators. In order to become respectable members of the international economic community, the Baltic states should adhere to the Universal Copyright Convention immediately and to the Berne Convention as soon as they can make the necessary changes in their copyright legislation. Meeting the demands of U. S. negotiators is less important, because trade agreements with the United States dating from the 1920s are already in force in Estonia,[38] Latvia,[39] and Lithuania.[40]

B. Patent and Trademark Law

The problem of creating patent and trademark offices is more urgent and more complex in the Baltic states. As mentioned above, Estonia and Latvia are bound by their pre-World War II adherence to the Paris Convention for the Protection of Industrial Property. Lithuania is bound by a U.S.-Lithuanian trademark agreement.[41] Thus, Estonia and Latvia have an immediate international obligation to provide patent and trademark protection to foreign nationals. This obligation extends to Soviet citizens and enterprises, since the Soviet Union is also a party to the treaty. However, none of the Baltic states is yet a party to the Patent Cooperation Treaty, assuming that Soviet adherence to this treaty did not bind the illegally occupied Baltic states. Thus these states should adhere to the Patent Cooperation Treaty. They also should reopen the patent and trademark offices closed under Soviet occupation. Since they lack the resources to perform patent examinations, they will need to rely on examination reports done by other countries, under the system of the Patent Cooperation Treaty. Alternatively, they may wish to contract with some foreign patent office to perform examinations.

Soviet patents will have no legal effect in the Baltic states. The effect of a patent is limited to the country in which it is issued. Thus a USSR patent is effective only in the USSR. Since the Baltic states have never been a part of the USSR, Soviet patents can have no legal effect there.

The Future

The weakening or disappearance of USSR-level intellectual property law should facilitate rather than hinder movement to a market economy. The international treaties and republic level legislation that will remain largely reflect market principles.

The republics will need to make a number of technical legal accommodations to a new intellectual property regime, but these will not require any great investment of resources. No intellectual property system at the central or the republic level can be of great significance unless there is real movement toward a market economy. Investors still do not make decisions based upon potential profits. Price controls can prevent intellectual property owners from realizing rewards for their efforts. The collapse of the state planning system is causing most industries to lag ever further behind world technology levels, so they are not creating important patentable inventions.

Peter B. Maggs is Corman Professor of Law at the University of Illinois at Urbana-Champaign. He is the author of numerous books and articles on both Soviet and U.S. law, and has been a frequent visitor to the Soviet Union.

38 Treaty of Friendship, Commerce, Consular Rights, and Protocol, 23 December 1925, 44 Stat. 2379; 50 L.N.T.S. 13; Agreement According Mutual Unconditional Most-Favored-Nation Treatment in Customs Matters, 2 March 1925, T.S. 722, 43 L.N.T.S. 289.

39 Provisional Commercial Agreement According Mutual Unconditional Most-Favored-Nation Treatment in Customs Matters, 1 February 1926, T.S. 740, 55 L.N.T.S. 33; Treaty of Friendship, Commerce, and Consular Rights, 20 April 1928, 45 Stat. 2641, 80 L.N.T.S. 35.

40 Agreement According Mutual Unconditional Most-Favored-Nation Treatment in Customs Matters, 23 December 1925, T.S. 742, 54 L.N.T.S. 377.

41 Agreement Relating to the Registration of Trade-Marks, 14 September 1929, 9 Bevans 675.

The Harriman Institute Forum is published monthly
by
The W. Averell Harriman Institute for Advanced Study
of the Soviet Union, Columbia University.
Editor: Gordon N. Bardos
Assistant Editors: Kevin E. Laney, Charles F. Furtado, Jr.

The *Forum* is supported in part by a grant from the Carnegie
Corporation of New York
ISSN Number: 0896-114X
Subscription information: US/Canada: 1yr/$30;2yr/$50.
Elsewhere:1yr/$40;2yr/$75

Make check or money order payable to Columbia University
and send to *Forum*, Harriman Institute, 420 W 118th Street,

New York NY 10027

Selected back issues available at $3 apiece

HI NoteMaster and Elites

Data Management for Soviet Specialists

Sponsored by Columbia University's W. Averell Harriman Institute for Advanced Study of the Soviet Union, **HI NoteMaster** and the Soviet Elites Database together are a powerful PC-based program designed specially for students and scholars in the Soviet field.

HI NoteMaster is a note card and bibliography management system designed by scholars for scholars. Whatever your area of interest, you'll love **NoteMaster's** text management features! Most **NoteMaster** users participate in the Soviet Elites Project, which provides access to custom bibliographies, institution listings, individual biographies, and much more.

Easy to set-up and use! **NoteMaster installs in seconds and is ready to use from the moment you load it on your hard disk.** Why spend hours designing and programming your own database?

Integrated data management: **HI NoteMaster** provides instant access to the data you work so hard to collect, like **note cards and chronologies, bibliographies** for a paper or on a topic you define, as well as data on **organizations, people** and their **resumes.**

Find your data and sort it, fast! Search and select all your data powerfully and easily. NoteMaster selects only the information you want to see and takes just seconds to display it any way you want. NoteMaster can find Cards based on codes you assign ***or on any word in the Card.***

Print data in different formats: Print a single Card as a chronology entry, a note card, as a note from a Source, or as a subpoint in an outline. If NoteMaster's pre-defined layouts don't give your notes exactly the look you want, you can modify it with your word processor.

Exchange data with colleagues: The use of compatible systems allows easy data exchange--between you and the Elites Project, or you and another NoteMaster user. You can use data generated by another user together with your own immediately after loading it.

Access the Soviet Elites Database: The Harriman Institute's Soviet Elites Database Project is a wide-scale collaborative research project. As the international team of NoteMaster users provide information to Elites, the database continues to grow, and becomes more valuable to all Project participants. All users, for example, benefit from the substantial additions from the Institute of the United States and Canada, the Project's institutional partner in Moscow.

All this, and its affordable! Despite its power, NoteMaster is affordable--even if you're on a student budget. With your participation in the Soviet Elites Database Project you pay just $30.00.

Questions? For more information on **HI NoteMaster**, contact the Soviet Elites Database Project.

W. Averell Harriman Institute for
Advanced Study of the Soviet Union
420 West 118th Street, Room 1205
New York, NY 10027

(phone) (212) 854-8454
(fax) (212) 666-3481
(e-mail) mhd3@cunixb.cc.columbia.edu

Columbia University
Harriman Institute
420 W. 118th Street
New York, NY 10027

Non Profit Org.
US Postage
PAID
New York, NY
Permit #3593